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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIAS CASTANEDA,

Defendant and Appellant.

F056239

(Super. Ct. No. BF123190A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Patricia Lea Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Kari Lyn Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Gomes, Acting P.J., Hill, J., and Poochigian, J.

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A jury convicted appellant, Elias Castaneda, of four counts each of assault with a firearm (counts 2, 4, 6, and 8/Pen. Code, § 245, subd. (a)(2)) and second degree robbery (counts 1, 3, 5, and 7/Pen. Code, § 212.5, subd. (c)) and found true a personal arming enhancement in each count (Pen. Code, § 12022.53, subd. (b)). On September 19, 2008, the court sentenced Castaneda to an aggregate 28-year term. On appeal, Castaneda contends: 1) the evidence is insufficient to sustain his assault convictions and 2) the court erred in sentencing him. We will find merit to this latter contention. In all other respects, we will affirm.

FACTS

On April 8, 2007, Veronica Avila was working as a cashier at a Fastrip gas and convenience store on South Union Avenue in Bakersfield. Shortly before 3:30 a.m., Castaneda entered the store, placed a soda on the counter, and asked for a pack of cigarettes. Avila bent down to get a pack from under the counter and when she stood up, Castaneda pulled out a black handgun from his right pocket and placed it sideways on the counter next to the register pointing at Avila. Castaneda kept the gun pointed at Avila, as he told her to give him the money from the cash register. When Avila was not able to open the register immediately, Castaneda told her “Yes you can. And give me the money quickly or you want something to happen[?]” Avila opened the cash register and gave Castaneda over \$200.

As Castaneda left the store, he told Avila not to call the police or something could happen to her. Avila later identified Castaneda from a photo lineup as the person who robbed her.

On April 21, 2007, Corrina Alvarez was working at the same Fastrip gas and convenience store on Union Avenue. Shortly after 11:00 p.m., Castaneda entered the

store, placed a soda and some seeds on the counter, and asked for cigarettes. Alvarez turned away from Castaneda to get the cigarettes and when she turned back he placed a handgun on the counter sideways, pointing at Alvarez. Castaneda told Alvarez to give him all the money in the register or she would get hurt. Castaneda ran out of the store after Alvarez gave him a little over \$2,000. Alvarez later identified Castaneda from a photo lineup as the person who robbed her.

On April 25, 2007, Leland Johnson was working at the T-Mart clothing store on Ming Avenue in Bakersfield. At approximately 7:30 p.m., he was helping a customer when he looked up and saw Castaneda with one hand in the cash tray of a cash register as he was being attended to by Mi Sook Jeong. After Castaneda ran out of the store, Jeong appeared to be in shock. Johnson identified Castaneda from a photo lineup as the person he saw with his hand in the cash register. A surveillance video of the incident showed that after Jeong rang up a purchase, Castaneda pulled out a black handgun and pointed it at her. The video also shows Castaneda kept the gun pointed at Jeong as he took money out of the cash register.

On May 4, 2007, Jason Bustillos was working at the Fastrip gas and convenience store at Panama Lane and H Street in Bakersfield, when Castaneda came in, grabbed some chips and asked for a pack of cigarettes. As Bustillos approached the register, Castaneda pulled out a silver handgun and laid it on the counter pointing at Bustillos. Castaneda told Bustillos to open the cash register and give him the money. After Bustillos complied, Castaneda ran away. A witness later identified Castaneda at an in-field show-up as the person she saw running out of the Fastrip gas and convenience store after it was robbed earlier that day.

DISCUSSION

The Sufficiency of the Evidence

Castaneda contends the evidence is insufficient to sustain his assault with a firearm convictions in counts 2, 4, 6, and 8 because there was no evidence presented at trial that established the gun he used to commit these offenses was loaded or that he threatened to use it in an assaultive manner. We disagree.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

“[P]ointing an unloaded gun at another person with no effort or threat to use it as a bludgeon, is not an assault with a [firearm]. This is for the reason that there is no present ability to commit a violent injury on the person. [Citation.]” (*People v. Orr* (1974) 43 Cal.App.3d 666, 672.) “The question of whether or not the gun was loaded is a question for the jury, and the prosecution can establish it by circumstantial evidence. [Citation.]” (*Ibid.*)

“The fact that an object used by a robber was a ‘firearm’ can be established by direct or circumstantial evidence.” (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435-1436 (*Monjaras*).) “Circumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [Citation.]” (*Id.* at p 1436.) “Indeed, ... ‘words and actions, in both verbally threatening and in displaying and aiming [a] gun at others, [can] fully support[] the jury’s determination the gun was sufficiently operable [and loaded].’ [Citation.]” (*Id.* at p. 1437.)

In *Monjaras*, the defendant demanded of the female victim, “‘Bitch, give me your purse’” as he lifted his shirt and exposed what appeared to be the handle of a handgun. In finding this sufficient for the jury to reasonably infer the gun was real and loaded, the *Monjaras* court stated:

“Common sense and common experience illustrate that little has changed since 1927, when a court astutely observed that criminals ‘do not

usually arm themselves with unloaded guns when they go out to commit robberies’ [Citation.] If anything, with the proliferation of handguns in America since 1927, robbery has become a more dangerous crime today because of the greater likelihood that victims will protect themselves by using deadly force against the robber. Consequently, it is all the more unlikely today that robbers use toy guns or unloaded or inoperable weapons.

“As the old saying goes, ‘if it looks like a duck, and quacks like a duck, it’s a duck.’ The pistol tucked into defendant’s waistband looked like a firearm, and it in effect communicated that it was a firearm when defendant menacingly displayed it and ordered the victim to give him her purse. While it is conceivable that the pistol was a toy, *the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand.*” (*Monjaras, supra*, 164 Cal.App.4th at p. 1437, italics added.)

Here, Castaneda implicitly threatened each robbery victim with a handgun by placing the handgun on the counter and pointing it at each victim as he demanded money and/or took money from each victim. During two of the robberies, he also threatened the victim. Thus, as in *Monjaras*, the jury here could reasonably infer from these circumstances that the gun Castaneda used to commit each robbery was loaded and operable and that Castaneda intended to use it if his demands were not met.

Castaneda appears to contend he did not use the handgun in a threatening manner because on each occasion he held the gun sideways on the counter. Therefore, according to Castaneda, his use of a gun to commit each robbery did not support an inference that it was loaded. This contention, however, ignores the fact that the gun was just as deadly and intimidating whether it was on the counter positioned on its side pointing at the victim or positioned straight up, pointing at the victim. Additionally, we note that it appears from surveillance videos introduced into evidence that Castaneda positioned the gun on its side merely to prevent other customers from seeing what was going on and not in an effort to mitigate its threatening appearance or deadliness. Accordingly, we reject Castaneda’s sufficiency of the evidence claim.

Castaneda's Sentence

The court sentenced Castaneda to an aggregate 28-year term as follows: the midterm of four years on count 1 and a 10-year arming enhancement in that count, a consecutive 16-month term on count 3 (one-third the middle term of four years) and an enhancement term of three years four months (one-third the enhancement term of 10 years) on the arming enhancement in that count, a consecutive 16-month term on count 5 (one-third the middle term of four years) and an enhancement term of three years four months on the arming enhancement in that count, a consecutive 16-month term on count 7 (one-third the middle term of four years) and an enhancement term of three years four months on the arming enhancement in that count, and stayed three-year terms on counts 2, 4, 6, and 8. The court also struck the firearm enhancements in these four counts.

Castaneda contends the court erred in sentencing him to an aggregate 28-year term because it used the middle term of four years for first degree robbery instead of the middle term of three years for second degree robbery to calculate his aggregate sentence. Thus, according to Castaneda, the trial court should have sentenced him to an aggregate term of 26 years instead of the 28-year term it imposed. Respondent concedes and we agree. !(ROB: 11.)!

The middle term for second degree robbery is three years. (Pen. Code, § 213, subd. (a)(2)). Since the court imposed the middle term on Castaneda's robbery conviction in count 1, it should have imposed a three-year term instead of the four-year term it imposed on that count. The court should also have imposed a consecutive one-year term (one-third the middle term of three years) on each of the three remaining robbery counts it sentenced him consecutively on. This would have resulted in an aggregate sentence of 26 years instead of the aggregate 28-year term the trial court imposed.

DISPOSITION

The judgment is modified to reduce Castaneda's aggregate term from 28 years to 26 years as calculated above. The trial court is directed to issue an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.